IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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SUPREME COURT, U.S.

NO. 74-5174

JOHN WALLACE EBERHEART, JR.,

Petitioner,

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v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

Indicted for rape and kidnapping by the grand jury of Cook County, Georgia, Petitioner, John Wallace Eberheart, Jr., was tried before a jury and found guilty of each charge. Petitioner was sentenced to death on each charge.

The victim of the kidnapping and rape was motoring from Detroit, Michigan, to join her husband in Florida. The victim had remained in Michigan to complete her college studies before joining her husband in Florida.

On July 13, 1973, the victim was motoring south on Interstate Highway 75 when she experienced automotive problems near Cordele, Georgia. After having two tires replaced in Cordele, the victim continued on her journey. Shortly thereafter, however, one of the new tires blew out and the victim found herself stranded alone on the interstate highway near Adel.

It was near dusk and the victim switched on the emergency blinking lights of her automobile. The victim also ripped up a bedsheet into strips and placed these strips on the radio antenna and the outside mirrors of her automobile. The victim then sought unsuccessfully to operate the jack in an effort to replace the blown-out tire with the spare.

Eddie Dean Anderson, John Wesley Hooks, and Petitioner Eberheart were out driving around in the Adel area on the evening of July 13, 1973. While motoring south on the interstate highway, the above trio picked up two hitchhikers bound for Florida. Shortly thereafter the group passed the victim as she attempted to change the tire on her disabled automobile.

Hooks was driving and as he passed the victim he pulled over in the emergency lane and came to a stop. Hooks, Anderson, Eberheart, and one of the hitchhikers got out of the car in which they were riding and started back toward the victim. Anderson asked if the group could be of assistance. Frightened by the presence of four male rescuers, the victim declined the offer of assistance and asked them to send for help. The group

departed and the hitchhikers were let out at the next exit. Having ascertained that the victim was alone, the trio returned north on the interstate highway, passed the victim, exited, and returned south on the interstate highway toward the victim.

After Hooks pulled in behind the victim, the trio alighted from their automobile and approached their victim. Eberheart and Hooks struck the victim and continued to beat upon her. In the meantime Anderson returned to the automobile in which the trio had been riding and pulled alongside the victim's automobile. Eberheart opened the rear door and Hooks threw the screaming, struggling victim into the automobile driven by Anderson. Anderson started to pull away while the door was still open. In his excitement to get under way, Anderson left Eberheart on the highway.

Anderson drove to a secluded area as Hooks continued to pummel the victim. When Anderson reached the secluded area, Hooks removed the victim from the automobile and dragged the victim by her hair across as asphalt roadway. As Anderson returned to get Eberheart, Hooks raped the victim and jammed his penis down the victim's throat. Having satiated his sexual appetite, Hooks pulled up his trousers and spat upon the victim.

In the meantime, Anderson returned with Petitioner Eberheart. Eberheart then proceeded to rape the victim but had difficulty maintaining an erection. Eberheart then jammed his penis into the victim's mouth but continued to experience difficulty in maintaining an erection. Frustrated, Eberheart got up and walked away. The victim was then raped by Anderson.

After Anderson ravished the victim, the trio departed and the victim, severely beaten and in near hysterics, made her way to a nearby home where she summoned help.

Apart from the anguish and degradation suffered by the victim as a result of the multiple rapes, the evidence in this case also reflects that the victim was beaten unmercifully about the head and shoulders. As a result of the beating, the victim suffered a dislocated jaw and a broken nose. As well, the beating sheared off two of the victim's molers and uprooted two other teeth. Too, a pierced earring was ripped from the victim's earlobe. The victim was also kicked and choked. After the victim had been abducted and taken to a secluded area she was dragged by her hair across an asphalt roadway, inflicting severe asphalt burns on her left thigh and buttock. Finally, the victim was placed between two stumps to be raped. One stump was infested with large red ants, known locally as "cowboys," and the victim suffered many bites from the insects.

From the judgments of conviction and the sentences of death, Petitioner Eberheart appealed to the Supreme Court of Georgia. The judgments of conviction and sentences of death were affirmed. Eberheart v. State, 232 Ga. 247, 206 S.E. 2d 12 (1974).

Additional facts will be developed subsequently, as necessary, for a more thorough illumination of any issue raised by the petition.

REASONS FOR NOT GRANTING THE WRIT

I. THE IMPOSITION AND CARRYING OUT OF THE SENTENCES OF DEATH IN THIS CASE WOULD NOT BE VIOLATIVE OF THE EIGTHTH AMENDMENT PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT. (Question 1).

A. "Arbitrary Selectivity"

The thrust of Petitioner's argument "is that the arbitrary selectivity condemned in Furman v. Georgia [408 U.S. 238 (1972)] has been carefully preserved in Georgia's modified capital procedures." Petition, p. 45. In inviting the Court to review this case, involving a statutory response to Furman permitting a modicum of discretionary sentencing, and in inviting the Court to review the "mandatory" (Petition, p. 46) response to Furman evidenced by Dillard v. North Carolina, No. 73-6875, Petitioner has revealed his true argument; Petitioner would condemn both responses in that, in his view, both perpetuate the "arbitrary selectivity" condemned in Furman. In effect, Petitioner's argument may be summarized with the epigram "discretion is discretion -- as death is death."

The "discretion is discretion" argument mistakenly assumes that Furman condemned discretion under the Eighth Amendment per se. In view of the fact that the justices of this Court comprising the majority in Furman expressly or implicitly relied on "the evolving standards of decency that mark the progress of a maturing society" [Trop v. Dulles, 356 U.S. 86, 101 (1958)], it would be anomalous if the

capital punishment procedures permissible in the wake of Furman are procedures that must be devoid of any element of discretion. Indeed, in a prior opinion of the Court, a majority, including Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Stewart, recognized that without the "link between contemporary community values and the penal system" provided by jury discretion, "the determination of punishment could hardly reflect "those same 'evolving standards of decency.'" Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968).

Respondent submits that, if the majority in Furman can be viewed as having agreed upon any single factor in rendering the sentences before them unconstitutional, then that factor was not discretion, but the discrimination presumed to have tainted the exercise of that discretion.

It should also be observed that there is absolutely nothing in the record sub judice to indicate that the discretion permitted by Ga. Laws 1973, pp. 159-172 has been discriminatorily exercised. The historical approach followed by some of the majority in Furman and reliance upon empirical evidence outside the record is precluded sub judice, for the procedures sub judice are a break with

the past. To invalidate the statute under review, the Court would have to hold that the discretion permissible under the statute is so broad as to infect it with an impermissible potential for arbitrary action, a potential so likely to become realized as to justify the Court in quelling it even in the absence of proof of discrimination. While statutes have often been voided under similar circumstances in First Amendment cases [exemplified by Lovell v. City of Griffin, 303 U.S. 444 (1938); cf., Mills v. Alabama, 384 U.S. 214 (1966)], where freedoms vital to our self-government were at stake, there is no precedent for taking such a course in a case arising under the Eighth Amendment.

Precluding a jury from exercising a strictly controlled discretion as provided for in the statute under review would foster the creation of a draconian system with no capacity for mercy. The Court, however, has only recently reaffirmed a rejection of the notion that "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." Williams v. Illinois, 399 U.S. 235, 243 (1970), quoting Williams v. New York, 337 U.S. 241, 247 (1949). Surely, the Eighth Amendment is broad enough to encompass the exercise of a controlled sentencing discretion, for even the dissenters in Furman "...could more easily be persuaded that mandatory sentences of death, without the intervening and

ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution." Furman v. Georgia, supra at 402.

b. Excessiveness

Petitioner argues that "the punishment of death is excessive, disproportional, and aberrational for rape and kidnapping." Petition, p. 47. Petitioner does not distinguish between those rapes that, because of the victim's fear or threat of harm by the attacker, involve no more physical force than an ordinary act of sexual intercourse and those rapes that can only be discribed as heinous and atrocious.

The Georgia statute provides for appellate review of whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code of Georgia § 27-2537(c). Respondent submits that consideration of the circumstances of the crime and the defendant on a case by case basis is the only meaningful measure of whether a sentence of death, in any particular rape case, is excessive.

Respondent concedes that a sentence of death in the vast majority of rape cases will be generally deemed excessive. Cf., Coley v. State, 231 Ga. 829, 204 S.E. 2d 612 (1974). Respondent, however, certainly does not concede that a sentence of death in a rape and kidnapping case is always excessive: the circumstances of any particular case must be scrutinized before the penalty can be deemed excessive.

Even assuming arguendo that merely because a sentence is excessive, it is unconstitutional under the Eighth Amendment, under the circumstances of the case sub judice, the penalty of death can hardly be deemed excessive.

C. Contemporary Standards of Decency

Petitioner apparently anchors his argument that contemporary standards of decency preclude imposition of the death penalty upon "[t]he rarity with which the...penalty is imposed." Petition, App., p. 3c. Earlier, Petitioner revealed the facile nature of his present argument when he alluded to "frequent and routine application" of the penalty. Petition, p. 46.

Moreover, the fact that most states authorizing capital punishment prior to Furman have subsequently enacted legislation,[1] providing for the imposition of capital punishment

[1] 87 Harv. L. Rev. 1690, 1691 n. 6 (1974).

in a manner thought to be constitutionally acceptable under the Eighth Amendment, refutes Petitioner's "contemporary standards of decency" argument.

II. THE ISSUE OF WHETHER THE APPELLATE REVIEW MECHANISM OF GA. LAWS 1973, PP. 159-172 (GA. CODE § 27-2537) DEPRIVES PETITIONER OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW, AS WELL AS THE EFFECTIVE ASSISTANCE OF COUNSEL, HAS NOT BEEN SEASONABLY PRESENTED TO THE SUPREME COURT OF GEORGIA. (Question 2).

Petitioner frames the second issue upon which he seeks certiorari review, as follows:

> "2. Whether the provisions for appellate review of death sentences established by the new Georgia capital punishment statute, Ga. Laws, 1973, pp. 159-172, Act No. 74, violate the rights of an indigent defendant to the effective assistance of counsel guaranteed by the Sixth Amendment of the Constitution of the United States and to the Due Process of Law and Equal Protection of the Laws guaranteed by the Constitution of the United States?" Petition, p. 2.

As noted previously, Petitioner attacks Ga. Laws 1973, pp. 159-172 on the basis of a perceived unconstitutionality of the statute under Furman v. Georgia, 408 U.S. 238 (1972). In arguing that the statute is plagued with "arbitrary selectivity" Petitioner, in effect, has argued that the appellate review mechanism provided for under the statute does not ameliorate what Petitioner perceives to be an otherwise arbitrary statute subject to condemnation under Furman; indeed, argues Petitioner, the review mechanism results in "a perpetuation of the Eighth Amendment Arbitrariness condemned by this Court on June 29, 1972." Petition, p. 40. The second issue framed by Petitioner, however, exceeds the "perpetuation" attack and asserts that the review mechanism fosters constitutional deficiencies separate and apart from asserted Eighth Amendment prohibitions against capital punishment.

The question of whether the appellate review mechanism, separate and apart from any asserted deficiencies under Furman, deprives the indigent capital defendant of due process and equal protection under the law, as well as the effective assistance of counsel, was initially presented to the Supreme Court of Georgia in Petitioner Eberheart's motion for rehearing. See Petition, pp. 16-17. The Supreme Court of Georgia denied the petition for rehearing without opinion. Eberheart v. State, supra, 232 Ga. at 255, 206 S.E. 2d at 12.

For purposes of review in this Court, Petitioner's attempt to raise a federal question in the Supreme Court of Georgia after judgment, upon a motion for rehearing, is untimely. See Bohannan v. Arizona, 389 U.S. 1 (1967); Herndon v. Georgia, 295 U.S. 441 (1935); Jett Bros. Distilling Co. v. Carrollton, 252 U.S. 1 (1920); see also Miller v. California, 413 U.S. 15, 34 n. 14 (1973); Hanson v. Denckla, 357 U.S. 235, 243-244 (1958).

The second question framed by Petitioner is not ripe for consideration by the Court.

III. TWO PROSPECTIVE JURORS, STATING THAT THEY COULD NOT, UNDER ANY CIRCUMSTANCES, CONSIDER IMPOSITION OF THE SUPREME PENALTY, WERE PROPERLY EXCUSED FOR CAUSE. (Question 3).

Petitioner urges the Court to review the exclusion of two prospective jurors, having expressed opposition to capital punishment, from the jury that found him guilty of rape and kidnapping and sentenced him to death. Petitioner advances three separate and distinct arguments in support of his contention that the two jurors were unconstitutionally excluded from jury service.

Under either argument advanced by Petitioner, this case is not worthy of consideration by the Court. Each argument will now be considered.

A. Exclusion from Guilt-Innocence Jury

Petitioner's initial argument is premised on the fact that the statute in question provides for a bifurcated procedure in determining guilt or innocence and, if guilt, punishment. Petitioner argues that the statute does not require, nor express, a preference that the sentencing jury be identical to the jury that finds the capital defendant guilty. Petitioner's argument is further based upon his supposition that there is no empirical evidence to suggest that unalterable opposition to capital punishment would preclude a juror from deciding a capital defendant's guilt or innocence if another jury was required to fix the Defendant's punishment[2] upon a verdict of guilty. Concludes Petitioner, the exclusion of jurors Kretlow and Day, after having expressed unalterable opposition to capital punishment, from service upon the jury that deliberated his guilt or innocence deprived him of due process and equal protection under the law.

Petitioner's initial premise is faulty and, under the circumstances of this case, he has failed to raise a substantial federal question.

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[2]Under the statute in question a sentence of death is, of course, not mandatory upon a verdict of guilty.

As a practical matter, the jury that found Eberheart guilty of rape and kidnapping also fixed his punishment at death by electrocution. Moreover, under the statute, whether the jury that deliberates a defendant's guilt or innocence is to be the same jury that set the defendant's punishment in the event of a guilty verdict is peculiarly a matter of state law. Cf., Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673, 680-681 (1929); see Lloyd v. Matthews, 155 U.S. 222 (1894). Too, under any reasonable construction, Ga. Laws 1973, pp. 159, 161-162 (Ga. Code Ann. § 27-2534) does not provide for the empanelling of separate juries for determinations of guilt and punishment respectively.[3] The strained construction of the statute advanced by Petitioner was implicity rejected by the Supreme Court of Georgia.[4] Eberheart v. State, supra 232 Ga. at 250-251, 206 S.E. 2d at 15-16.

The questions presented to the Court by Petitioner would be appropriate for consideration only if, under the statutory scheme provided, separate juries did, in fact, adjudicate guilt and fix punishment. As one jury did not find Petitioner guilty

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[3]The statute provides, in part, as follows:

> "Where the jury... returns a verdict... of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury...at which time the only issue shall be the determination of punishment to be imposed."
> (Emphasis added.)

[4]It should also be noted that the construction advanced by Petitioner is contrary to settled Georgia practice since the advent of bifurcated criminal proceedings in 1970.

of rape and kidnapping and another fix his punishment at death by electrocution, Petitioner would have the Court render an advisory opinion on the question presented. See Witherspoon v. Illinois, 391 U.S. 510, 520 n. 18 (1968).

B. Unalterable Opposition to Capital Punishment

Petitioner's second argument simply invites the Court to ascertain whether the jury sub judice was properly death-qualified under Witherspoon v. Illinois, 391 U.S. 510 (1968).

Code of Georgia § 59-806(4)(1933) provides that inquiry as to opposition to capital punishment should be propounded on the jurors voir dire. Thus, jury panels are aware, before they hear any evidence in any particular capital case, of the magnitude of the punishment that may be suffered by the defendant.

Sub judice, two jurors were excused for cause at the instance of the State. In response to the statutory voir dire question propounded by the district attorney, each juror expressed general conscientious opposition to capital punishment. Upon more incisive questioning, one juror indicated that he "could not under any circumstances even consider the imposition" of the supreme penalty. Likewise, the other juror indicated that he was so conscientiously

opposed to the imposition of the supreme penalty that he "could not even consider the imposition of the death penalty in any capital felony case."

The trial judge was satisfied that, under Witherspoon v. Illinois, supra, the jurors were properly excused for cause in that each unmistakably answered that his reservation toward capital punishment was such that he could never vote to impose the death penalty regardless of the facts in a case. The Supreme Court of Georgia also concluded that the exclusion of the jurors in question was permissible under Witherspoon. Eberheart v. State, supra, 232 Ga. at 250-251, 206 S.E. 2d at 15-16.

There is no further need for this Court to review the question presented by Petitioner. The state trial court and the state supreme court, applying appropriate federal constitutional principles, have previously found Petitioner's contentions to be without merit. Under the facts of this case, the conclusion reached by the Supreme Court of Georgia is undeniably correct; there is no need for further review of a legally sound opinion.

C. Representative Jury

Citing Duncan v. Louisiana, 391 U.S. 145 (1968), Petitioner argues that the exclusion of prospective jurors expressing unalterable opposition to capital punishment deprives him of his Sixth Amendment right to a jury that is representative of the community. In essence, Petitioner would have the Court adopt the concurring opinion of Mr. Justice Douglas in Witherspoon v. Illinois, supra, 391 U.S. at 524-532.

Respondent submits that the Sixth Amendment certainly does not mandate the inclusion of those unalterably opposed to capital punishment on juries that may be asked to impose the supreme penalty on a defendant. As to the issue of punishment, such jurors would obviously be partial to the defendant and "[n]o one is guaranteed a partial jury." Witherspoon v. Illinois, supra, 391 U.S. at 530 (separate opinion of Douglas, J.).

As to whether the exclusion of those unalterably opposed to capital punishment from a jury that is required to determine guilt, as well as to fix punishment, deprives a defendant of a "representative" Sixth Amendment jury, the record is devoid of any factual information that would be of assistance to the Court. Petitioner has made no effort to establish that the jury that found him guilty of rape and kidnapping was

unrepresentative on the issue of guilt. Even if a Defendant were successful in demonstrating that his jury, arguably neutral with respect to penalty, was biased in favor of the prosecution with respect to guilt,

> "...the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence -- given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment." Witherspoon v. Illinois, supra, 391 U.S. at 520 n. 18.

As noted above, however, Petitioner Eberheart has made no effort to demonstrate that his jury was guilt-biased. Petitioner's effort to set aside his conviction on the basis

of the death-qualification of the jury must fail for the same reasons that the Court rejected William Witherspoon's contentions.[5] Id. at 516-518.

[5]Petitioner Eberheart, in essence, implores the Court to reconsider Witherspoon because he has mounted a Sixth, as well as Fourteenth, Amendment attack on the exclusion of venireman opposed to capital punishment. Petitioner has overlooked the fact that Witherspoon was apparently decided under the Sixth as well as the Fourteenth Amendments. 391 U.S. at 518.

CONCLUSION

The Court should refuse to grant the writ of certiorari because no sufficient reason for review has been set forth by Petitioner Eberheart.

Respectfully submitted,

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